Supreme Court, U.S.
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No. 97-142

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

**Tillman Corporation,**

*Petitioner,*

v.

**The Fidelity & Casualty Company of New York,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

The questions presented for review are appropriately framed:

1. Whether the Courts below appropriately recognized the exception to Indiana's general rule regarding the agency status of a "broker" when confronted with the role of a "producer" in the context of Indiana's Worker's Compensation Plan?
2. Whether the Court's consideration of Indiana's Worker's Compensation Handbook was proper, to the limited extent that the Seventh Circuit referred to this document?

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## STATEMENT OF THE CASE

The central issue to the proceedings below and the basis for this petition is Tillman Corporation's ("Tillman" or "Petitioner") insistence that there exists a "consistent and unequivocal" rule of Indiana's common law that holds that an insurance broker is the agent of an insurance company and not the insured, once a policy has been issued. The Petitioner would represent to this Court that the District Court for the Northern District of Indiana ("District Court") and the Seventh Circuit Court of Appeals improperly abandoned an established line of cases and forged new law, albeit inappropriately. This is simply not the case. The "well-established" rule of law referenced by the Petitioner contemplates the procurement of a policy directly through the agent/broker. Here, Fidelity was assigned to be Tillman's worker's compensation carrier by the Indiana's Compensation Rating Bureau. The general rule, consequently, does not apply. Following Indiana's established rules of agency and decisions from the Indiana Supreme Court, the District Court and Seventh Circuit held that a "producer" (i.e. worker's compensation insurance broker) under these circumstances is not the agent of the insurer.

In December of 1990, the president of the now defunct Tillman Corporation contacted Elmer Layden, Inc. ("Layden") to procure various insurance policies for a new company. Layden assisted Tillman in obtaining various insurance policies, including general commercial liability, premises liability and umbrella coverage. Since worker's compensation insurance is hard to come by for new companies, Layden proceeded to obtain this coverage from Indiana's assigned-risk pool. Layden prepared an appli-

cation for worker's compensation coverage on Tillman's behalf and sent it to Indiana's Compensation Rating Bureau ("Bureau"); the agency responsible for Indiana's assigned-risk pool. It is important to point out that under Indiana's Worker's Compensation Plan, Layden is considered a "producer" (as opposed to an agent or broker) in his role as an intermediary with the Bureau. The application that was eventually submitted and signed by both Tillman and Layden listed an estimated payroll for 1991 of $150,000.00. This estimate required an advance premium of $3,303.00, which was submitted with the application to the Bureau.

On January 15, 1991, the Bureau sent Tillman a Worker's Compensation and Employer's Liability Policy Binder. The Bureau assigned The Fidelity & Casualty Company of New York ("Fidelity" or "Respondent") as Tillman's insurer and forwarded Tillman's advance premium of $3,303.00. The worker's compensation policy provided for an audit at year's end to determine the actual payroll and the resulting final premium. While Layden had agency agreements with several insurance companies, it had no previous dealings, nor any agency agreement, with Fidelity.

Apparently, Tillman realized early on that his payroll estimate of $150,000.00 was seriously understated. Accordingly, Tillman began making advance premium payments to its "producer", Layden, with the impression that Layden would pass these on to Fidelity. Neither Tillman nor Layden ever received a bill or request for premium payments from Fidelity, as no premium payments were calculated by or owed to Fidelity until the end-of-the-year audit. Between March, 1991 to July,

1991, Tillman paid Layden weekly or bi-weekly installments totalling $187,000.00. Of the $187,000.00, Layden forwarded only $9,946.00 to Fidelity and kept the rest for himself.

From January, 1991 through September, 1991, Tillman submitted 113 worker's compensation claims incurred by its employees to Fidelity for review and payment. Fidelity paid each of these claims, as required by the worker's compensation policy it was compelled to issue to Tillman. The total of these claims came to approximately $74,000.00. In February of 1992, Tillman submitted to Fidelity an audit of its payroll showing a total payroll of over $6,000,000.00 for the period of January 2, 1991 to September 30, 1991; a total payroll amounting to $5,850,000.00 more than Tillman's original estimate. This newly disclosed figure resulted in a total premium of $140,618.00. After accounting for the initial premium of $3,303.00 paid to Fidelity and the $9,946.00 actually submitted by Layden, Fidelity issued a statement of adjusted premium to Tillman for $127,369.00. Tillman insists that it fulfilled its duty to remit the required premiums by providing payments to the now incarcerated and insolvent Layden. It is Tillman's argument that Layden, an insurance broker sought out and engaged by Tillman, should be considered the agent of Fidelity for the purposes of this case. Both the District Court and the Seventh Circuit Court of Appeals disagreed with Tillman.

The District Court granted summary judgment in Fidelity's favor. The District Court held that there was no agency relationship between Fidelity and Layden, either at the inception of the limited relationship be-

tween the parties through their involvement with the Bureau, nor in their subsequent dealings. In its decision, the District Court followed the recent Indiana Supreme Court decision of *Benante v. United Pacific Life Insurance Co.*, 659 N.E.2d 545 (Ind. 1995) and basic theories of Indiana agency law in determining that an insurer required to provide coverage through Indiana's assigned-risk pool was not bound in an agency relationship with a "producer" chosen by the insured.

The Seventh Circuit correctly affirmed the grant of summary judgment. *Fidelity and Cas. Co. of New York v. Tillman Corp.*, 112 F.3d 302 (7th Cir. 1997). The Seventh Circuit did acknowledge that Indiana's rule considers an insurance broker the agent of the insurer after the issuance of a policy. However, the Seventh Circuit correctly recognized that this rule does not apply to worker's compensation insurance obtained through Indiana's assigned-risk pool. The Court pointed out that the line of Indiana's cases clung to so tenaciously by the Petitioner all arise from situations in which the intermediary applied for a policy, which the insurer then agreed to issue. In this case, Fidelity did not agree to any proposal from Layden. The Seventh Circuit held that under Indiana law, agency is a voluntary relation, and Fidelity's compulsory issuance of a worker's compensation policy procured through an agent with whom Fidelity had never chosen to do business could not forge this voluntary association.

Contrary to what has been repeatedly argued by the Petitioner, the Federal Courts below have not abandoned a clear line of Indiana precedent. The "simple rule" touted by the Petitioner does not apply to situations

where an insurer has not and cannot choose to do business with a broker selected by the insured. By applying general theories of agency law to the facts of the case below, the District and Appellate Courts both concluded that the "producer," Layden, was not the agent of Fidelity. This conclusion comports with Indiana law, and should therefore stand.

## REASONS FOR DENYING THE PETITION

### I.

### THE COURTS BELOW DECIDED A QUESTION OF STATE LAW, AND THEREFORE THE ISSUES PRESENTED BY THIS PETITION ARE NOT OF THE SORT THAT WARRANT THIS COURT'S REVIEW.

Decisions by the Federal District and Appellate Courts relating solely to state law have traditionally been accepted by this Court, and under such circumstances, *certiorari* is appropriately denied. The deference afforded the District and Appellate Courts' decisions in this matter should be no different.

The Petitioner, at both the District and Appellate phases of these proceedings, asked our Federal Courts to decide a question solely of Indiana State law, to-wit, whether under Indiana's Worker's Compensation Plan a "producer" is the agent of the insurer or the insured. In both the District Court decision and the decision of the Seventh Circuit, these Courts considered Indiana's Worker's Compensation Plan and the general rules of agency as they have developed in the State of Indiana. The cases cited by the Courts and by the Petitioner reflect that the issues at bar relate exclusively to questions of

interpreting Indiana law. This Court has repeatedly held that when the Courts below review questions of state law, their determinations on these issues are generally accepted, and *certiorari* is appropriately denied.

For example, in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), this Court was asked to review an Ohio statute regarding a prosecutor's ability to establish county policy. This Court held that "[w]e generally accord great deference to the interpretation and application of state law by the Court of Appeals." *Id.* at 484 n. 13. This principle is echoed in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985), which also held that "[n]ormally . . . we defer to the construction of a state statute given it by the lower federal courts."

One reason given to this deference relates to the limited resources of this Court. In *Cort v. Ash*, 422 U.S. 66, 72 n. 6 (1975), it was held:

> This Court must necessarily depend upon the District Courts and Court of Appeals for initial determinations of questions of state law; indeed, our practice of deference to such determination should generally render unnecessary review of their decisions in this respect.

Another reason offered by this Court for its reliance on the lower court's determination of state law issues is the relatively greater experience and expertise these Courts have with the state law of their respective Circuits. This position was expressly stated in *Chardon v. Fumero Soto* 462 U.S. 650, 654 n. 5 (1983), which instructs:

> [I]n dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of

> particular states unless their conclusions are unreasonable.

(See, also, *Bishop v. Wood*, 426 U.S. 341, 345-346 (1976) and *Gooding v. Wilson*, 405 U.S. 518, 524 n.2 (1972).)

In any event, it is this Court's practice "to accept a reasonable construction of state law by the Court of Appeals even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

The U.S. Supreme Court has traditionally denied *certiorari* of issues relating to District and Appellate Court determinations of state law. As explained above, this deference to the Courts below arises in no small part to the greater familiarity these Courts can claim with the law of the states within each Circuit. At least as important, however, is the value of preserving the Court's attention and energies for the federal questions that clamor for deliberate decision. State law is properly left to the primary keeping of the Appellate Courts, and through them, to the District Courts. Consequently, the District Court of Indiana and the Seventh Circuit Court of Appeals' decisions relating to the reasonable construction and application Indiana's Worker's Compensation Plan and Indiana agency law should be given their deference, and the inappropriate petition for certiorari on these issues should therefore be denied.

## II.

## THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES PRESENTED.

### A. The Courts below correctly determined that the State of Indiana's general rule regarding agency status of a broker does not apply to a "producer" as contemplated by Indiana's Worker's Compensation Plan.

Even if one accepts, *ad arguendo*, that the issues presented in this case are the sort typically appropriate for *certiorari*, the Courts below fully considered and correctly decided the issues presented. The Petitioner repeatedly argues that the Seventh Circuit failed to apply "long-standing Indiana case law" regarding the agency status of an insurance broker. The Petitioner rallies behind the *Erie* doctrine in insisting that the Seventh Circuit's departure from this line of cases requires reversal of the Seventh Circuit's decision. The *Erie* doctrine commands that the Federal Courts sitting in diversity must honor state substantive law *when it is applicable*.[1] What the Petitioner fails to appreciate is that the "general rule" that it cites is inapplicable to the case at bar.

The Seventh Circuit recognized the distinction between Indiana's rule regarding insurance brokers and the situation that faced Fidelity. The general rule discussed by the Petitioner holds that an intermediary in the insur-

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[1] See, generally, *Erie Railroad Co. v. Topkins*, 304 U.S. 64 (1938); *Cotton v. Minter*, 469 F.Supp. 199, 202 (E.D. Mich. 1979) ("If there are no holdings from state courts . . . on the matter that the federal court is to decide, that court must look for other indications of state law.").

ance business is the agent of the insured while shopping for a policy, and the agent of the insurer after a policy issues. See *Aetna Insurance Co. v. Rodriguez*, 517 N.E.2d 386 (Ind. 1988). Indiana's general rule arises from situations in which the intermediary applied for a policy, which the insurer agreed to issue. "Agency" is a relationship resulting from manifestation of consent by one party to another that the latter will act as an agent for the former. *Hope Lutheran Church v. Chellew,* 460 N.E.2d 1244 (Ind. App. 1984). The agent must accept and agree to the arrangement and must be subject to the principal's control. *Id.* In short, agency is a voluntary relationship. Indiana's rationale for treating intermediaries as agents of the insurers is that the insurers can decide with whom to deal. Carriers may demand that would-be agents establish their trustworthiness, and may set conditions, (*e.g.*, requiring fidelity bonds, audits of the books, compensation for risk bearing) to protect themselves. Generally, insurers are best situated to monitor intermediaries (brokers) through which they choose to deal, and therefore bear the risk of loss.

As the Seventh Circuit correctly points out, insurers cannot do any of these things for worker's compensation policies placed through Indiana's assigned-risk pool. Under Indiana's Worker's Compensation Plan, the insurer cannot choose its customers or set its rates. Moreover, because the insured/employer selects the "producer," the insurer has no control over the producer's identity or practices. That the insurer cannot refuse to deal with producers, cannot require the producer to obtain a fidelity bond, and cannot force the producer to hold premiums in escrow accounts evidence the lack of ultimate control the insurer faces under Indiana's Plan.

Where an agency relationship is voluntary, Fidelity's relationship with the producer Layden was nothing short of compulsory.

Since no Indiana Court had spoken to the particular issue of the agency status of a "producer," and considering the silence of Indiana's judiciary on this point, the Seventh Circuit turned to other sources for guidance. Among them was the Indiana Supreme court decision of *Benante*, *supra*. *Benante* takes a multi-factor balancing approach for the ordinary determination of agency, and instructs:

> In determining whether one is a broker or an agent, it is necessary to consider the facts and circumstances of the case, the relation of the parties, their actions, their usual course of dealing, and instructions given to the person by the company, the conduct of the parties generally, and the nature of the transaction. *Benante*, 659 N.E.2d at 548.

The Seventh Circuit agrees that the facts of this case do not support the finding of agency, even under the general agency case of *Benante*. There was no written agency agreement between Fidelity and Layden. Layden himself testified that there was no agency relationship with Fidelity. Nothing in the record of the facts presented by the Petitioner would suggest that Layden was in any way under the control of Tillman. The only evidence presented by the Petitioner in support of the proposition that Layden was Fidelity's agent was that Tillman was provided work sheets that bore Fidelity's name at the top. That Fidelity may arguably have provided these work sheets to Tillman through Layden does not create the authority for Layden to collect premiums on Fidelity's behalf. No authority, expressed, apparent or

implied, was given to Layden to collect premiums on Fidelity's behalf, and therefore no agency relationship exists.

As is demonstrated above, the Seventh Circuit appropriately distinguished the case at bar from the sort of case requiring the application of Indiana's rule governing insurance brokers. The decisions of both the District and Appellate Court comport with Indiana's general considerations of agency and how they should be applied in this matter. The decisions of the Court below are therefore correct, and the Petitioner cannot succeed on the merits. For this reason, *certiorari* should be denied.[2]

**B. The Courts below gave the Plan's Handbook its limited and proper consideration.**

The Petitioner argues at length that the District Court and the Seventh Circuit Court of Appeals inappropriately considered *Indiana Worker's Compensation Plan, Information and Procedures* (Handbook) in deciding Layden's agency status. Throughout the Petition, Tillman persists

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[2] Even if the courts below was erroneous, this is seldom an appropriate reason for granting a petition for writ of certiorari. It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions. The Court's aim, rather, has traditionally been to resolve conflicts among the lower courts to determine questions of importance. The correctness or erroneousness of the decisions below has never been meant to be the central focus of the Court's exercise of its *certiorari* jurisdiction. As Justice Rehnquist said for the Court in *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974), "[t]his Court's review * * * is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

in stating that the Seventh Circuit and the District Court "abandoned long-standing Indiana case law" and instead relied on this Handbook. The Petitioner is under the misapprehension that the Seventh Circuit gave this Handbook the full force and effect of Indiana law. The Seventh Circuit expressly states otherwise, indicating "This is not at all to say that the Bureau's publication is a rule with the force of law . . . ." *Fidelity*, 112 F.3d at 305. The Seventh Circuit does point out that no case in Indiana deals with the agency status of a broker procuring worker's compensation insurance for an employer. Without the guidance of clear Indiana authority, the Seventh Circuit was required by the *Erie* doctrine to estimate how the courts in Indiana would decide the issue. See *Valerio v. Home Ins. Co.*, 80 F. 3d 226 (7th Cir. 1996). In making this estimation, it has been routinely held that:

> [T]he federal court may consider all available legal sources, including the Restatements of Law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and "the majority rule."

*Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 398 (5th Cir. 1986), *cert. denied*, 478 U.S. 1022 (1986).

In the present case, the Seventh Circuit logically suggests that in light of the silence of Indiana's judiciary on the matter, that the Bureau's Handbook would be an authoritative word on how Indiana's courts would interpret the Worker's Compensation Plan. Particularly enlightening is the following caution found in the Handbook:

> Important note to the producer [Layden]: Remember, although you have an important role under the Plan, you are not a contract agent or an agency of the servicing carrier [Fidelity]. You have no authority from the servicing carrier to bind or cancel coverage or to otherwise act within such agency relationship. Unless a legal finance agreement exists which assigns cancellation or premium refund collection rights to a third party, all premium transactions are strictly between the servicing carrier and the employer as a policyholder and you are not a party to that contract. A servicing carrier may give you certain authority, such as permission to issue certificates of insurance, but such rights are not to be routinely assumed by a producer.

Fidelity issued its policy directly to Tillman. Fidelity as servicing carrier, did not give Layden the type of authority to which the final sentence refers. Fidelity did not select or approve Layden for any other purpose, either; it never voluntarily issued any policy through his firm.

The Plan's Handbook expressly echoes the conclusions drawn from Indiana's agency law: a "producer" such as Layden simply should not be considered the agent of an involuntary insurer like Fidelity. That the District Court and the Seventh Circuit point to this passage as confirmation of their independent analysis of Indiana's agency law in no way violates the *Erie* doctrine or its progeny.

Finally, the Petitioner's lengthy discussion of the *Chevron* doctrine is entirely misplaced. The *Chevron* doctrine[3] established guidelines for reviewing a federal agency's

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[3] This doctrine arises out of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

construction of a federal statute enacted by Congress. The Seventh Circuit, in its decision, simply states that *if* a Federal Court were dealing with a federal agency, it would be disposed to give a certain degree of respect to that agency's interpretation of the underlying federal law. The Seventh Circuit only makes an analogy to the *Chevron* doctrine in its reference to the Bureau's publications, suggesting that while the Worker's Compensation Bureau's publications are not a rule of law, they "reflect a view that a federal court should respect." *Fidelity*, 112 F.3d at 305. The Petitioner will find no quarrel from the Respondent that the *Chevron* doctrine does not control here. It is doubted that the Seventh Circuit would take issue with this either. The Seventh Circuit has merely indicated that it is required to make an estimate as to how Indiana's courts would answer the agency issue in the absence of clear precedent on point, and that the Bureau's publication is instructive in that regard. That the Petitioner has seized upon the incidental citation to *Chevron* provides scant support for a petition for *certiorari* to the United States Supreme Court.

## CONCLUSION

As the cases and reasoning set forth above demonstrate, the review of a state law decision by the District Court and the Circuit Court of Appeals is not a proper basis for *certiorari*, and consequently Tillman's Petition should be denied. Moreover, even if the questions presented were the sort traditionally heard by this Court, the Courts below fully considered and correctly decided the issues presented, making this review unnecessary.

WHEREFORE, your Respondent, Fidelity & Casualty Company of New York, respectfully requests this Court deny Tillman Corporation's Petition for a Writ of Certiorari.

Respectfully submitted,

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